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PTO/SB/33 (07-05)

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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Docket Number (Optional)

YOR9-2001-0461 (8728-524)

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on May 1, 2006

Signature

Typed or printed name David W. Malloy

Application Number

09/916,935

Filed

July 27, 2001

First Named Inventor

Castelli

Art Unit

2121

Examiner

Hirl, Joseph P.

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐

applicant/inventor.

☐

assignee of record of the entire interest.

See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)☒

attorney or agent of record.

Registration number 56,652☐

attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 \_\_\_\_\_

Signature

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Telephone number

May 1, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

☐

\*Total of \_\_\_\_\_ forms are submitted.

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**PATENT APPLICATION**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**APPLICANT:** CASTELLI, et al.      **DOCKET NO:** YOR9-2001-0461 (8728-524)  
**SERIAL NO:** 09/916,935      **GROUP:** Art Unit 2121  
**FILED:** July 27, 2001      **EXAMINER:** HIRL, Joseph P.  
**FOR:** METHOD AND APPARATUS FOR PREDICTION OF COMPUTER  
SYSTEM PERFORMANCE BASED ON TYPES AND NUMBERS OF  
ACTIVE DEVICES

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**STATEMENT IN SUPPORT OF PRE-APPEAL BRIEF REQUEST FOR REVIEW**

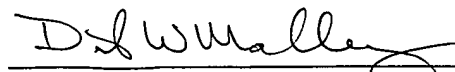
This paper is being filed in support of Applicant's Pre-Appeal Brief Request for Review. A Notice of Appeal has been filed herewith in response to the Final Office Action mailed on February 1, 2006. Applicants respectfully contend that the claim rejections set forth in the Final Office Action are erroneous as a matter of law and fact for the reasons set forth in Applicants' previous Responses, filed on May 18, 2005, November 4, 2005, and April 3, 2006, which are incorporated herein by reference.

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**CERTIFICATE OF MAILING UNDER 37 C.F.R. §1.8(a)**

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Dated: 1 May '06

  
David W. Malloy

**Claim 42** was rejected as containing new matter where the material the Examiner has incorrectly cited, “segmenting of variable length historic data, comparison of segmented historic data, comparison of unequal length of historic data and comparison of non-homogeneous type data,” is absent from claim 42. Claim 42 recites:

A method for predicting a subsequent resource utilization in a computer system having a plurality of devices, the plurality of devices comprising active devices and non-active devices, comprising the steps of:

monitoring, over a period of time, a contemporaneous resource utilization to obtain first monitored values of the contemporaneous resource utilization;

monitoring, over the period of time, a number of the active devices to obtain second monitored values of the number of the active devices, wherein the monitored number is capable of varying over the period of time;

monitoring, over the period of time, a type of each of the active devices to obtain third monitored values of the type of the each of the active devices; and

predicting the subsequent resource utilization, based upon the first monitored values, the second monitored values, and the third monitored values.

**Claim 7** was rejected as indefinite because the term “rejuvenating” was deemed “a relative term and renders the claim indefinite” without the Examiner providing a full explanation of the deficiency as required in MPEP 706.03(d).

In response to Applicant's arguments that software rejuvenation is a well known term and is used in other patents and described in technical papers, the Examiner replied the intent of claim 1 is to be for a continuous operation because one of the claim elements is a method step of monitoring, over a period of time. The Examiner then states that claim 7, which depends from claim 1 and provides the additional method step of rejuvenation, is a discontinuous operation teaching away from the intent of claim 1. He defines the intent of claim 1 based on one claim element and not by the preamble of claim 1.

The "intent" of a claim has no legal significance. The "intent" of a claim, even if significant, cannot be defined by one of the claim elements. Whether or not claim 7 has an "intent" of a continuous operation, there is no "intent" for a perpetual operation. It is irrelevant

whether the monitoring operation is continuous or discontinuous. A period of time has an end occurring, for example, when a condition is met. Claim 7 describes an operation to be performed following the occurrence of a condition. Claim 7 is a further limitation to claim 1 and not necessarily a further limitation to the monitoring step of claim 1 as implied by the Examiner.

In the Advisory Action the Examiner asks how much rejuvenation is to be performed. Software rejuvenation is a discrete operation and not an operation that can be performed by percentages as indicated by the Examiner.

Claims 1-41 were rejected under 35 U.S.C. § 102(e), as being anticipated by Sweet, et al., U.S. Patent No. 6,836,800 (hereinafter Sweet).

Regarding **Claim 1**, the Examiner states that Sweet anticipates, *inter alia*, “predicting the subsequent resource utilization, based upon the monitored values of the contemporaneous resource utilization and the number of active devices (Sweet, c 3, l 25-41; Examiner’s Note (EN): para 11 applies; the number of active devices is integrated into the system operation as shown in Fig. 1).” Sweet does not disclose “predicting the subsequent resource utilization, based upon the monitored values of the contemporaneous resource utilization and the number of active devices.

Regarding **Claim 21**, the Examiner states that Sweet anticipates, *inter alia*, “identifying resource saturation, based upon the monitored values of the resource utilization and the number of active devices (Sweet, c 4, l 42-58; EN: signature detection establishes monitored values for the active devices).” Furthermore, in the Examiner’s response to Applicant’s November 4, 2005 arguments regarding claim 21, the Examiner states that ““identifying resource saturation” is equivalent to an “alarm threshold” which Sweet teaches @ c 2:66.” Sweet does not disclose “identifying resource saturation, based upon the monitored values of the resource utilization and

the number of active devices.” In the cited passage of the Examiner’s response, Sweet discloses “...the signature may be used to establish an alarm threshold (i.e., an alert threshold) to allow a network manager to be alerted automatically to unusually high data traffic, due perhaps to a network malfunction or unauthorized use of the network...” However, Sweet does not disclose that the alarm threshold is related to “resource utilization and the number of active devices.” “High data traffic,” “network malfunction” or “unauthorized use” do not equate with “resource utilization and the number of active devices.” Accordingly, Applicant believes claim 21 is neither anticipated nor rendered obvious in light of Sweet and is allowable over the prior art of record.

Regarding **Claims 31 and 40**, the Examiner states that Sweet anticipates, *inter alia*, “predicting the effects of adding the new device, based upon the monitored values of the resource utilization and the number of active devices (Sweet, c 2, l 5-20; EN: such is automatic adaptation).” Sweet does not disclose “predicting the effects of adding the new device, based upon the monitored values of the resource utilization and the number of active devices.” The Examiner equates Sweet’s “performance thresholds can be automatically adapted” with Applicant’s “predicting the effects of adding the new device.” Applicant respectfully disagrees with the Examiner’s apparent belief that “automatically adapting” is synonymous with “predicting the effects of adding the new device.” Automatically adapting refers to performance thresholds and not to “new devices.”

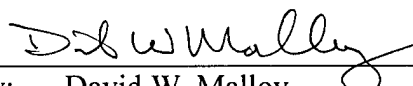
Regarding **Claim 38**, the rejection, wherein the Examiner states that Sweet discloses, *inter alia*, predicting the effects of adding the new device, based upon the monitored values of the resource utilization and the number of active devices (Sweet, c2, l 5-20; EN; such is

automatic adaptation),” does not apply since Sweet does not disclose the limitation in claim 38 of a “prediction device for predicting the subsequent resource utilization...”

The rejection of **Claim 39**, wherein the Examiner states that Sweet discloses, *inter alia*, predicting the effects of adding the new device, based upon the monitored values of the resource utilization and the number of active devices (Sweet, c2, l 5-20; EN; such is automatic adaptation),” does not apply since Sweet does not disclose the limitation in claim 39 of “a forecasting device for identifying resource saturation...”

**Claims 2-20, 22-30 and 32-37** depend from independent claims 1, 21, and 31 respectively. Accordingly, Applicant believes the dependent claims are allowable for at least the reasons given above for the independent claims.

Respectfully submitted,

  
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